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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE**

PAUL ORSHAN, et al., individually, and on behalf of all others similarly situated,

Plaintiffs.

V.

APPLE INC.,

Defendant.

Case No. 5:14-CV-05659-EJD

**PLAINTIFFS' OPPOSITION TO
DEFENDANT APPLE INC.'S MOTION
TO DISMISS FIRST AMENDED
CLASS ACTION COMPLAINT**

Hearing Date: July 16, 2015

Time: 9:00 a.m.

Judge: Hon. Edward J. Davila

Courtroom: 4, 5th Floor

Amended Complaint: April 9, 2015

Trial Date: Not Set

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1 **I. PRELIMINARY STATEMENT**

2 This case concerns Defendant Apple Inc.’s (“Defendant” or “Apple”) advertising
3 conduct related to misrepresentations and omissions regarding storage capacities and the need to
4 purchase supplemental storage for some of its most popular products, including its iconic
5 iPhone. While the facts underlying Apple’s scheme are somewhat complicated, the outcome of
6 this motion turns upon two utterly simple questions: (1) would a reasonable consumer plausibly
7 be deceived by Apple advertising its devices as possessing substantially more storage capacity
8 than consumers actually receive; and (2) are Apple’s targeted ads notifying consumers that they
9 must purchase supplemental memory deceptive and misleading? To answer these questions does
10 not require a sophisticated understanding of the law or the relevant technology, but a basic sense
11 of fairness and honesty. As one proposed class member noted to Plaintiffs’ counsel, “If I buy a
12 box of 16 cookies, I expect there to be 16 cookies, not 12.5.” Apple has sold boxes of cookies to
13 millions of American consumers, who are now realizing their boxes are far from full—only to
14 turn around and sell the remainder of the box back to consumers for an additional cost and on a
15 monthly basis.

16 Plaintiffs Paul Orshan, Christopher Endara, and David Henderson brought this action
17 against Apple on behalf of themselves and all similarly situated purchasers of 8 GB and 16 GB
18 iPhones, iPads and iPods (the “Devices”) who upgraded to iOS 8 or had iOS 8 preinstalled.
19 Plaintiffs, like millions of others, bought Apple Devices with iOS 8, or upgraded their Devices
20 to iOS 8, in reliance upon Apple’s misleading statements and omissions. As detailed in the First
21 Amended Complaint (ECF No. 18, “FAC”), Defendant Apple has, through misrepresentations
22 and crucial omissions of material facts, hidden from consumers that the Devices, whether pre-
23 installed with iOS 8, or “upgraded” to iOS 8 after their purchase, possess actual storage capacity
24 that deviates from the advertised storage capacity by as much as 23.1%. Nor can iOS 8 be
25 removed from a Device once it has been installed; its substantial limitation of a customer’s
26 storage capacity is irreversible. To add insult to injury, after providing less storage capacity than
27 advertised, Defendant aggressively markets its iCloud monthly-fee-based storage, essentially
28 forcing customers with depleted space on their Devices to buy, for a second time, and on an

1 ongoing basis, storage capacity they believed they already owned.

2 In its Motion to Dismiss First Amended Class Action Complaint (“Def.’s Mem.”),
3 Defendant does not contest that the Devices pre-installed with iOS 8 have far less storage
4 capacity than the 8 or 16 GB advertised. Nor does Defendant contest that the installation of the
5 iOS 8 upgrade permanently deprives customers of storage capacity for which they paid.
6 Nonetheless, Defendant seeks dismissal of the FAC, arguing not so much that Plaintiffs fail to
7 state a claim upon which relief can be granted, but rather that the more than two dozen
8 documents it (improperly) attaches to its motion undermine the theory of Plaintiffs’ case. For
9 the reasons set forth below, Defendant’s motion is without merit, and should be rejected in its
10 entirety.¹

11 First, Defendant argues that Plaintiffs have failed to plead the necessary elements of
12 their fraud-based claims. Defendant’s central argument is that to the extent Plaintiffs expected
13 that iOS 8 would take up less than 18-23% of their Devices, that expectation was unreasonable.
14 Plaintiffs’ disagree with this contention, but more importantly, this factual dispute is not
15 appropriate for resolution at this stage of the litigation. Neither is Defendant’s assertion that
16 Apple’s free iCloud service “more than makes up for any capacity used by iOS 8” appropriate
17 for resolution at the pleading stage. Def.’s Memo at 15. Discovery will demonstrate that storage
18 on the iCloud is less valuable than storage capacity on a Device, because, among other things it
19 is more difficult to utilize (i.e., requires WiFi or cellular service, which can consume costly
20 data) and is subject to a variety of well-publicized security risks.

21 Defendant next argues that Plaintiffs cannot state a claim under the CLRA because the
22 iOS 8 operating system is software and, therefore, not a “good” for purposes of the CLRA. This
23 argument ignores the fact that the FAC focuses on the purchase of the Devices and the lack of
24

25 ¹ Much of Defendant’s motion to dismiss hinges upon the 28 documents Defendant attached
26 to its motion. As Plaintiffs demonstrate in their accompanying opposition to Defendant’s request
27 for judicial notice, Defendant’s attempt to create a detailed factual record at the motion to
28 dismiss stage—rather than honoring the allegations set forth in the FAC—is highly improper.
This Court should decline to take judicial notice of Defendant’s exhibits or reject Apple’s
request that the Court accept the documents for the truth of the matter asserted.

1 storage ultimately available on the Devices, not any purchase of iOS 8, the upgrade to which is
2 free.

3 Finally, Defendant contends that Plaintiffs lack standing to sue concerning those Devices
4 they never bought. Again, Defendant is mistaken. It is well established in this Circuit that a
5 plaintiff has standing to represent purchasers of substantially similar products, particularly at
6 early stages of the litigation.

7 For these reasons, and others set forth below, this Court should deny Defendant's motion
8 to dismiss.

9 **II. FACTUAL BACKGROUND**

10 Apple is a corporation organized under the laws of the State of California and has its
11 principal place of business in Cupertino, California. It is one of the world's largest producers of
12 technology for personal consumption. Its mobile phones ("iPhones"), tablet computers
13 ("iPads"), and media players ("iPods") dominate the market, in the United States and
14 worldwide. FAC ¶ 7.

15 During the relevant time period, Defendant made misrepresentations to consumers about
16 the storage capacities of its 8 GB and 16 GB iPhones, iPads and iPods. Defendant currently
17 markets and sells the iPad and the iPod, as well as the newest versions of its signature mobile
18 phone, the iPhone 6 and 6+.² In its advertising, Defendant represents that iPhone 6 and 6+ are
19 available with a base storage capacity of 16 GB, as are current models of iPod and iPad. By
20 contrast, prior models offered during the Class Period had a base model of 8 GB. A plurality, if
21 not a majority, of Apple devices are purchased at the lowest storage offering. And the primary
22 (if not the only) differentiating feature among iPod, iPad and iPhone models is the storage
23 capacity. FAC ¶¶ 14-15.

24 The newest versions of Apple's Devices come with Apple's newest operating system,
25 iOS 8 and iOS 8 is installed onto earlier versions of the Devices by way of an "upgrade." As it
26 turns out, however, Devices running Apple's iOS 8 lack nearly a quarter of their promised

27
28 ² Predecessor models include the iPhone 5S and 5C introduced in or about September 2013,
and the iPhone 4S introduced on or about October 10, 2011.

1 storage capacity. Nor is this known to consumers before they purchase their Devices and/or
2 install iOS 8. Instead, Defendant employs false, deceptive and misleading practices in
3 connection with marketing, selling, and distributing the Devices in order to conceal the fact that
4 the Devices, once running iOS 8, have far less space than advertised.³

5 For example, consider Defendant's advertising of the iPhone 6 to interested consumers.
6 In its advertising, marketing, and promotional materials—including Defendant's Internet
7 website, product packaging, and product displays—Defendant misrepresents the iPhone 6 as
8 having 16 GB of storage capacity. Defendant knows—but conceals and fails to disclose in its
9 advertising, marketing and promotional materials—that the operating system and other pre-
10 installed software consume a substantial portion of the represented storage capacity of each of
11 the Devices. What's more, Defendant fails to disclose to consumers that pre-installed iOS 8
12 consumes up to 3.7 GB on a device represented to have 16 GB of storage capacity. In other
13 words, Defendant represents that an iPhone 6 has 16 GB of storage space in its advertising,
14 while concealing and failing to disclose that, on models with iOS 8 pre-installed, more than 20%
15 of that space is unavailable to the consumer. And Defendant's marketing of the other Devices
16 with pre-installed iOS 8 is similarly false and misleading.

17 In addition to misleading consumers who purchase Devices with pre-installed iOS 8,
18 Defendant misrepresents and fails to properly disclose to consumers whose Devices run
19 predecessor operating systems that an upgrade from iOS 7 to iOS 8 consumes between 600 MB
20 and 1.3 GB of storage space, or that iOS 8 requires consumers to retain certain applications
21 (“Apps”) on their phones, which consume precious space, whether they want them or not.⁴

22 But the deception on the front end is only half the deception. Not only does it cheat its
23

24 ³ The Complaint sets forth the percent of the represented capacities of the Devices
25 unavailable to users (when iOS 8 is installed) as follows: 20.6% for the iPhone 6+; 18.8% for
26 the iPhone 6; 18.1% for the iPhone 5s; 21.3% for the iPad Air; 21.3% for the iPad; 23.1% for
the iPod. Compl. at ¶ 22.

27 ⁴ In the wake of, and possibly in partial response to the filing of this litigation, Apple
28 released a software update that materially decreased the storage space required to install the
upgrade to iOS 8.

1 customers out of much of the storage capacity it promised them, but it then exploits customers'
2 lack of storage space to bolster sales of its monthly-fee-based cloud storage system, iCloud. In
3 short, Apple gets its clients coming and going. FAC ¶ 3.

4 Plaintiffs are three consumers deceived by Apples above-described practices. In
5 February 2014, Plaintiff Paul Orshan, a resident of Florida, purchased two iPhone 5S'
6 represented by Apple to have 16 GB of purported storage capacity from the AT&T Store located
7 in Coral Gables, Florida. Then, in November, 2012, Plaintiff Orshan also purchased two iPads
8 represented by Apple to have 16 GB of purported storage capacity at the Apple Store in the
9 Dadeland Mall. Plaintiff Orshan subsequently upgraded his Devices to iOS 8, and consequently
10 lost much of the storage capacity in his Devices, for which he paid a premium. FAC ¶¶ 6, 16-17.

11 Unlike Plaintiff Orshan, Plaintiff Christopher Endara purchased an Apple product—the
12 iPhone 6—which came with iOS 8 pre-installed. Also a resident of Florida, Plaintiff Endara
13 purchased his iPhone 6, which was represented as having 16 GB of storage capacity, from the
14 AT&T store located in Miami, Florida in December 2014. Because the Device has iOS 8, it in
15 fact contained significantly less storage capacity than the 16 GB advertised by Defendant. FAC
16 ¶¶ 6, 19.

17 On April 1, 2012, Plaintiff David Henderson, a Virginia resident, purchased an iPad2
18 represented by Apple 16 GB of purported storage capacity from the Apple Store located in
19 Clarendon, Virginia. Like Plaintiff Orshan's iPhone, Plaintiff Henderson's iPad2 came with a
20 predecessor operating system. Subsequent to his purchase, Plaintiff Henderson installed iOS 8
21 and lost much of the storage capacity in his Device. Once Henderson upgraded to iOS 8, his
22 iPad, which had previously performed almost flawlessly for him, slowed to a snail's pace and
23 became essentially useless. FAC ¶¶ 6, 21-22.

24 Plaintiffs purchased their Devises in reliance on Defendant's claims, on its website,
25 advertisements, product packaging, and other promotional materials, that their Devices labeled
26 "16 GB" in fact came equipped with 16 GB of storage space, and Plaintiffs paid a premium for
27 their Devices specifically based upon Apple's representation that they had a storage capacity of
28 16 GB. Plaintiff Endara would not have purchased a Device with pre-installed iOS 8 had he

1 known the Devices contained significantly less than 16 GB of storage space. FAC ¶ 20.
2 Likewise, Plaintiffs Orshan and Henderson would never have upgraded to iOS 8 had they
3 known it would so significantly erode their Devices' memory capacity and ultimate
4 functionality. FAC ¶¶ 18, 23.

5 **III. LEGAL STANDARD**

6 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
7 sufficiency of a complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim
8 may only be dismissed if “it appears beyond doubt that the plaintiff can prove no set of facts in
9 support of his claim which would entitle him to relief.” *Id.* (internal citations and quotation
10 marks omitted). The Court must accept as true all of the plaintiffs’ allegations of material fact
11 and construe them in the light most favorable to the plaintiff. *See Williams v. Gerber Prods. Co.*
12 (*Gerber*), 523 F.3d 934, 937 (9th Cir. 2008) . A complaint “must contain sufficient factual
13 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009).

15 Additionally, although fraud claims are subject to a higher pleading standard, the
16 standard is not as insurmountable as Defendant argues. Fed. R. Civ. P. 9(b). In other words,
17 claims grounded in fraud need only “be accompanied by the who, what, when, where, and how
18 of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
19 2003) (internal quotation marks and citation omitted). “To avoid dismissal for inadequacy
20 under Rule 9(b),” a “complaint [must] 'state the time, place, and specific content of the false
21 representations as well as the identities of the parties to the misrepresentation.'” *Edwards v.*
22 *Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (quoting *Alan Neuman Prods., Inc. v.*
23 *Albright*, 862 F.2d 1388, 1393 (9th Cir. 1989)). The particularity required in pleading fraud
24 must be “enough to give a defendant notice of the particular misconduct which is alleged to
25 constitute the fraud charged so that they can defend against the charge and not just deny that
26 they have done anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
27 2007) (citation omitted).

28

1 **IV. ARGUMENT**

2 **A. Plaintiffs' Claims Are Sufficiently Pledged To Survive A Motion to**
3 **Dismiss.**

4 Apple asserts that all of Plaintiffs' claims fail for the same reason, without ever
5 identifying their actual elements or the governing legal standards. As discussed below, after
6 setting forth the appropriate legal standards and viewing the allegations in the light most
7 favorable to Plaintiffs, it is evident that Plaintiffs have properly pleaded claims under the UCL,
8 FAL, and CLRA, and that Apple prematurely contests the merits of Plaintiffs' claims, not the
9 legal sufficiency of the FAC.

10 The UCL prohibits any "unlawful, unfair or fraudulent business practice and unfair,
11 deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. A cause of action
12 under the UCL can be based upon "not only advertising which is false, but also advertising
13 which[,] although true, is either actually misleading or which has a capacity, likelihood or
14 tendency to deceive or confuse the public." *Gerber*, 523 F.3d at 938 (internal citations and
15 quotations omitted); *see also Paduano v. Am. Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453,
16 1469 (2009) ("A perfectly true statement couched in such a manner that it is likely to mislead or
17 deceive the consumer, such as by failure to disclose other relevant information, is actionable
18 under the UCL.") (internal citations omitted).

19 The FAL makes it unlawful, in connection with the sale of goods or services, to make or
20 disseminate "any statement ... which is untrue or misleading, and which is known, or which by
21 the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof.
22 Code § 17500. To succeed on a cause of action for injunctive relief under the FAL, a plaintiff
23 must show that "members of the public are likely to be deceived" by an advertisement. *Day v.*
24 *AT&T Corp.*, 63 Cal. App. 4th 325 (1998).

25 The CLRA forbids "unfair methods of competition and unfair or deceptive acts or
26 practices undertaken by any person in a transaction intended to result or which results in the sale
27 or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Such acts and
28 practices include "[r]epresenting that goods or services have ... characteristics, ingredients,

1 uses, benefits, or qualities which they do not have,” Cal. Civ. Code § 1770(a)(5), and
2 “[r]epresenting that goods or services are of a particular standard, quality or grade ... if they are
3 of another.” Cal. Civ. Code § 1770(a)(7). The CLRA is to “be liberally construed ... to protect
4 consumers ... and to provide efficient and economical procedures.” Cal. Civ. Code § 1760;
5 *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808
6 (1971) (“Protection of unwary consumers from being duped by unscrupulous sellers is an
7 exigency of the utmost priority.”).

8 **1. To the extent their expectations are relevant to their claims,
9 Plaintiffs pleaded reasonable expectations. While Apple may
10 disagree about the reasonableness of Plaintiffs’ expectations,
11 this case does not present the “rare situation” that can be
12 resolved on a motion to dismiss.**

13 Apple argues that Plaintiffs failed to plead sufficient facts about their expectations for
14 their products.⁵ This argument fails for numerous reasons.

15 First, consumer expectations are not an element of Plaintiffs’ UCL claim. *Morgan v.
16 AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1256 (2009); *Comm. on Children’s
17 Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983) (superseded by statute on other
18 grounds) (“Allegations of actual deception, reasonable reliance, and damage are unnecessary.”)
19 As one court recently observed, “[u]nlike claims of common law fraud, a UCL plaintiff need
20 only allege that the defendant engaged in business practices likely to deceive the public, not that
21 the public actually possessed particular expectations or assumptions.” *Nava v. JP Morgan
22 Chase Bank, N.A.*, CV 14-7601, 20, 2014 U.S. Dist. LEXIS 173261, at *9 (C.D. Cal. Nov. 25,
23 2014). To the extent Apple suggests the contrary, that argument should be rejected.

24 Turning to the FAL and the CLRA, both are governed by the “reasonable consumer”
25 standard. *Gerber*, 552 F.3d at 938. Under this standard, a plaintiff “must show that members of

26 ⁵ Apple contends that Plaintiffs failed to plead “necessary elements” of their claims, yet
27 never recites the elements of Plaintiffs’ claims, nor specifies what element is missing. Its
28 ensuing arguments focus exclusively on whether Plaintiffs had reasonable expectations. Def.’s Mem at 10-11. In doing so, Apple has waived the right to challenge the sufficiency of the pleadings with regard to any other element of Plaintiffs’ claims.

1 the public are likely to be deceived.” *Id.* A “reasonable consumer” is “the ordinary consumer
2 acting reasonably under the circumstances” and “is not versed in the art of inspecting and
3 judging a product, in the process of its preparation or manufacture.” *Colgan v. Leatherman Tool*
4 *Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006).

5 To the extent the reasonable consumer standard implicates consumer expectations,
6 California courts have generally treated this as a question of fact, which cannot be resolved on a
7 motion to dismiss. *See Comm. on Children’s Television, Inc.*, 35 Cal. 3d at 214 (“Defendants’
8 contention that the words and images used do not constitute such misrepresentations, and did
9 not conceal material facts, frames an issue for trial, not demurrer.”); *Linear Tech. Corp. v.*
10 *Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134-135 (2007) (“Whether a practice is
11 deceptive, fraudulent or unfair is generally a question of fact which requires ‘consideration and
12 weighing of evidence from both sides’ and which usually cannot be made [at the pleading
13 stage].”); *see also Paduano*, 169 Cal. App. 4th at 1469; *Jou v. Kimberly-Clark Corp.*, Case No.
14 C-13-03075 JSC, 2013 WL 6491158, at *7 (N.D. Cal. Dec. 10, 2013).

15 Indeed, in *Gerber*, the Ninth Circuit noted that while “[d]ecisions granting motions to
16 dismiss claims under the Unfair Competition Law have occasionally been upheld” due to the
17 implausibility of the alleged fraud, these amounted to “rare situation[s].” *Gerber*, 523 F.3d at
18 938. The *Gerber* Court pointed to *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995) as an
19 example of the “rare situation” where it was appropriate to dismiss a consumer fraud case for
20 failure to allege a plausible deception to a reasonable consumer. *Williams v. Gerber Prods. Co.*,
21 (Williams) 552 F.3d 934, 939 (9th Cir. 2008). There, a plaintiff alleged that mailers he had
22 received fraudulently suggested that he had won a million dollar sweepstakes. But the mailer
23 explicitly stated multiple times that the plaintiff would win the prize only if he had the winning
24 number. “Thus, it was not necessary to evaluate additional evidence regarding whether the
25 advertising was deceptive, since the advertisement itself made it impossible for the plaintiff to
26 prove that a reasonable consumer was likely to be deceived.” *Id.* (citing *Freeman*, 68 F.3d at
27 285).

28 While Apple essentially concedes that it is a question of fact whether Plaintiffs’

1 expectations are reasonable (Def.’s Mem. at 11), Apple nevertheless asks this Court to make a
2 substantive finding of fact that Plaintiffs’ expectations are unjustified. But this is not a case, like
3 *Freeman*, where the alleged deceptive practice could not plausibly deceive a reasonable
4 consumer. Quite the contrary. Here, Plaintiffs alleged that, when they uploaded iOS 8 to their
5 Devices (or purchased Devices with iOS 8 pre-installed), they did not expect the iOS 8 to inhibit
6 use of the Devices or consume the storage space it does. FAC ¶¶ 18, 23. Plaintiffs further
7 alleged that this expectation was based on Apple’s failure to disclose the true impact that
8 uploading iOS 8 would have on their Devices. *Id.* Indeed, Plaintiffs’ expectations were based on
9 the lack of an appropriate warning by Apple that on the Devices iOS 8 would significantly
10 decrease their storage space, inhibiting use of the Devices. *Id.* ¶ 26. Plaintiffs also have pleaded
11 that they did not expect to have to purchase additional and external storage capacity on a
12 monthly subscription in order to store content that took up less space than the advertised storage
13 capacity of the devices. These expectations are reasonable, and to the extent Defendant
14 disagrees that a reasonable consumer would not find them deceptive, this issue cannot be
15 decided on a motion to dismiss.⁶ For these reasons, Plaintiffs have pleaded sufficient facts to
16 support their claims under the FAL and the CLRA.

17 Apple’s cases do not support a different conclusion. One was determined at summary
18 judgment, not a motion to dismiss. *O’Shea v. Epson Am., Inc.*, CV 09-8063 PSG (CWx), 2011
19 WL 3299936, at *1 (C.D. Cal. July 29, 2011), aff’d in part, 566 F. App’x 605 (9th Cir. 2014).
20 All others dealt with easily distinguishable facts, because—unlike here—none of the cases
21 involved statements that Plaintiffs’ could plausibly point to as being deceptive. *Baltazar v.*
22 *Apple, Inc.*, Case No. CV-10-3231-JF, 2011 WL 3795013, at *5 (N.D. Cal. Aug. 26, 2011)
23 (holding that advertisement *showing* iPad use outdoors did not create reasonable expectation of
24 use in all weather conditions); *Williamson v. Apple, Inc.*, Case No. 5:11-cv-00377 EJD, 2012
25 WL 3835104, at *6–7 (N.D. Cal. Sept. 4, 2012) (holding that where advertising made no claims

26 ⁶ See also *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1380, (2012); *Ham v. Hain*
27 *Celestial Grp., Inc.*, Case No. 14-cv-02044-WHO, 2014 U.S. Dist. LEXIS 141157, at *7 (N.D.
28 Cal. Oct. 3, 2014) (“Whether a reasonable consumer would be deceived by a product label is
generally a question of fact not amenable to determination on a motion to dismiss.”).

1 at all about durability of glass, it would be “a suspension of logic” for a consumer to believe the
2 phone was shatterproof); *Rice v. Sunbeam Prods. Inc.*, CV-12-7923-CAS (AJWx), 2013 WL
3 146270, at *5-6 (C.D. Cal. Jan. 7, 2013) (dismissing consumer fraud claims where a plaintiff
4 failed to identify any material misrepresentations consumers relied upon in making their
5 purchasing decisions).

6 **2. When the pleadings are construed with all reasonable
7 inferences in their favor, Plaintiffs alleged how the statements
8 were misleading and Apple’s disclosures only raise factual
9 disputes regarding whether a reasonable person would be
misled.**

10 Apple contends that its disclosures put Plaintiffs on notice of the Devices’ limitations.
11 Based on these disclosures, and without citing a single legal authority, Apple devotes almost
12 two pages to attacking Plaintiffs’ expectations and reasoning. Def.’s Mem. at 13-14. Once
13 again, Apple asks this Court to consider a factual dispute—whether Plaintiffs had reasonable
14 expectations—when it is black letter law that factual disputes cannot be decided on a motion to
15 dismiss.

16 In its marketing, Apple ubiquitously highlighted device capacity (8 or 16 GB) in large
17 print, while minimizing information about the actual “formatted capacity” of its devices. This
18 issue was specifically addressed in *Gerber*. There, the court found that consumers “should not
19 be expected to look beyond misleading representations on the front of the box to discover the
20 truth” in “small print.” *Gerber*, 552 F.3d at 939. Accordingly, the reasonableness of a
21 consumer’s understanding—best case for Defendant—is not appropriate for determination on a
22 motion to dismiss. A sober read of *Gerber* find that Defendant’s advertising and marketing is
23 unquestionably misleading.

24 Now Apple takes the position that its vague disclaimer of “actual formatted capacity
25 less” eviscerates Plaintiffs’ case. Apple is mistaken. And this only highlights a factual dispute
26 concerning the significance of the word “format.” Merriam-Webster defines format, in the
27 context of technology, as “a method of organizing data.” Notwithstanding Apple’s post-hoc
28 effort to redefine the term, formatting actually refers to the preparation and organization of the

1 storage medium. Thus, Apple’s reliance on this disclaimer is misplaced because the inclusion of
2 iOS 8, and accompanying impossible-to-delete applications, is not, technically speaking,
3 formatting at all.

4 And the fact that some tech-world blogs took notice of the disclaimer, or managed to
5 parse its meaning in some fashion, does not mean ordinary consumers understood. Indeed, as
6 the cookie analogy in paragraph one of this memorandum makes clear, reasonable consumers
7 did not understand. Under the reasonable consumer standard, specialized knowledge cannot be
8 imputed to the Plaintiffs. *See Colgan*, 135 Cal. App. 4th at 682. And even if Apple’s disclosures
9 were technically accurate (they were not), “a perfectly true statement couched in such a manner
10 that is likely to mislead or deceive the consumer” remains fully actionable under the UCL. *See*
11 *Paduano*, 169 Cal. App. 4th at 1469.

12 It also makes no difference that Apple called iOS 8 its “biggest release.” A reasonable
13 consumer could easily decide this statement was puffery, without drawing conclusions about the
14 actual memory iOS 8 would consume. This factual argument has no merit.⁷ By again attacking
15 the reasonableness of Plaintiffs’ expectations, Apple simply highlights a factual dispute about
16 whether its statements misled consumers. When the FAC is construed with all reasonable
17 inferences in Plaintiffs’ favor, they have alleged omissions and statements that create an
18 expectation that their Devices running on iOS 8 would provide the promised storage without
19 having to purchase additional iCloud memory on a monthly subscription. As noted above, a
20 reasonable consumer “is not versed in the art of inspecting.” *See Colgan*, 135 Cal. App. 4th at
21 682. Apple cannot exploit Plaintiffs’ lack of technical sophistication, nor denigrate their
22

23 ⁷ In a three-sentence argument, Apple contends that because it offers free storage on iCloud,
24 Plaintiffs cannot say their device storage is deficient. Def.’s Mem. at 15. Because this argument
25 relies exclusively on information outside the scope of the FAC, it must be rejected. But this
26 argument would fail in any event. Apple has never claimed that its 8 GB or 16 GB Device
27 storage included remote iCloud storage. And there is no reason to assume Device storage and
28 remote cloud-based storage are fungible. A user does not own or control the devices that house
cloud-based storage, and when information is put into cloud-based storage, it becomes subject to
unique security hazards and accessibility is conditioned upon access to WiFi or cellular service
which is subject to limited, and sometimes costly access. These issues preclude any
consideration of iCloud at this stage of litigation.

1 intelligence, to preclude them from bringing suit. In short, this prohibits dismissal on any basis
2 relating to consumer expectations.

3 **B. Plaintiffs' UCL, FAL, and CLRA claims are pleaded with the**
4 **requisite level of particularity.**

5 Plaintiffs' FAC contains well-pleaded claims under California's Unfair Competition
6 Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*; False Advertising Law ("FAL"), Cal.
7 Bus. & Prof. Code sec 17500, *et seq.*; and Consumer Legal Remedies Act ("CLRA"), Cal. Civ.
8 Code § 1750, *et seq.*

9 Contrary to Apple's attempts to impose a higher burden, the Federal civil system
10 remains subject to a notice pleading standard. Under Federal Rule of Civil Procedure 8(a)(2), a
11 complaint must contain a "short and plain statement of the claim showing that the pleader is
12 entitled to relief." *See Iqbal*, 556 U.S. at 677-78 (2009). Proper pleading does "not require
13 heightened fact pleading of specifics." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
14 "As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require
15 'detailed factual allegations ...', *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 55).

16 **1. Plaintiffs' claims are not subject to Rule 9(b).**

17 Defendant incorrectly asserts that Plaintiffs' claims are subject to the heightened
18 pleading standards of Rule 9(b). Only allegations sounding in fraud are subject to Rule 9(b).
19 "Rule 9(b) requires that, when fraud is alleged, 'a party must state with particularity the
20 circumstances constituting fraud ...' Where fraud is not an essential element of a claim, only
21 those allegations of a complaint which aver fraud are subject to Rule 9(b)'s heightened pleading
22 standard." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citing *Vess*, 317
23 F.3d at 1105 (9th Cir. 2003)) (internal quotations omitted). "To the extent a party does not aver
24 fraud, the party's allegations need only satisfy the requirements of Rule 8(a)(2)." *Id.* Rule 8(a)(2)
25 simply requires "a short and plain statement of the claim showing that the pleader is entitled to
26 relief." Indeed, as the Ninth Circuit has recognized "fraud is not a necessary element of a claim
27 under the CLRA and UCL..." *Kearns*, 567, F.3d at 1125.

28 Plaintiffs' UCL claim does not sound in fraud. "The UCL defines unfair competition as

1 ‘any unlawful, unfair or fraudulent business act or practice.’ Therefore, under the statute ‘there
2 are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent.”’ *In*
3 *re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009) (quoting *Daugherty v. American Honda Motor*
4 *Co., Inc.*, 144 Cal.App.4th 824, 837 (2006)) (internal quotations omitted). “[A] business practice
5 need only meet one of the three criteria to be considered unfair competition.” *McKell v.*
6 *Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1471 (2006) (quoting *South Bay Chevrolet v.*
7 *General Motors Acceptance Corp.*, 23 Cal. 3d 442, 449 (1979)). The FAC does not exclusively
8 rely on the fraud prong.

9 Neither the requirements for the unlawful or unfair prongs of the UCL sound in fraud,
10 nor do the allegations in the FAC related to the UCL claim. “Unlawful business acts or practices
11 within the meaning of the UCL include anything that can properly be called a business practice
12 and that at the same time is forbidden by law.” *McKell*, 142 Cal. App. 4th at 1474 (quoting *Cel-*
13 *Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)). “A practice
14 is forbidden by law if it violates any law, civil or criminal, statutory or judicially made, federal,
15 state or local.” *McKell*, 142 Cal. App. 4th at 1474 (citing *Smith v. State Farm Mut. Auto. Ins.*
16 *Co.*, 93 Cal. App. 4th 700, 718 (2001); *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838
17 (1994)). “By extending to business acts or practices which are ‘unlawful,’ the UCL permits
18 violations of other laws to be treated as unfair competition that is independently actionable.
19 Even if the violation of another law does not create a private right of action, if the violation
20 constitutes unfair competition, it is actionable.” *McKell*, 142 Cal. App. 4th at 1474-75 (quoting
21 *Kasky*, 27 Cal. 4th at 949-50) (internal quotations omitted).

22 “A business practice is unfair within the meaning of the UCL if it violates established
23 public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to
24 consumers which outweighs its benefits.” *McKell*, 142 Cal. App. 4th at 1473 (quoting *Schnall v.*
25 *Hertz*, 78 Cal. App. 4th 1144, 1166 (2000)). “The determination whether a business practice is
26 unfair involves an examination of that practice’s impact on its alleged victim, balanced against
27 the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh
28 the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”

1 *McKell*, 142 Cal. App. 4th at 1473 (quoting *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App 4th 952,
2 965 (2000)) (internal quotations omitted). Defendant's attempt to negate the entire unfair prong
3 of the UCL by citation to a single Illinois case is unavailing. The Court in *Pirelli Armstrong*
4 *Tire Corp. v. Walgreen Co.*, Case No. 09-C-046, 2010 WL 624709, at *6 (N.D. Ill. Feb. 18,
5 2010), considered a complaint so generalized that the court could not identify which specific
6 state's consumer fraud statute applied.

7 Even if the Court were to consider Plaintiffs' UCL claim under the fraud prong, Rule
8 9(b) would not apply. "The fraudulent business practice prong of the UCL has been understood
9 to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually
10 false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs
11 damages. None of these elements are required to state a claim for injunctive relief' under the
12 UCL." *In re Tobacco II Cases*, 46 Cal. 4th at 312 (citing *Day*, 63 Cal. App. 4th at 332 (1998);
13 *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1105 (1996)). "A
14 fraudulent business practice is one which is likely to deceive the public. It may be based on
15 representations to the public which are untrue, and also those which may be accurate on some
16 level, but will nonetheless tend to mislead or deceive. A perfectly true statement couched in
17 such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose
18 other relevant information, is actionable under the UCL." *McKell*, 142 Cal. App. 4th at 1471
19 (citing *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1290
20 (2002); *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1137 (2001); *Bank of the West v.*
21 *Superior Court*, 2 Cal. 4th 1254, 1267 (1992)) (internal citations omitted). "The determination
22 as to whether a business practice is deceptive is based on the likely effect such practice would
23 have on a reasonable consumer." *McKell*, 142 Cal. App. 4th at 1471 (citing *Lavie v. Procter &*
24 *Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003)).

25 **2. The FAC satisfies Rule 9(b).**

26 Even if Plaintiffs' claims were subject to the heightened pleading standards of Rule 9(b),
27 the FAC easily meets those requirements. Rule 9(b) only requires "that the circumstances
28 constituting the alleged fraud be specific enough to give defendants notice of the particular

1 misconduct ... so that they can defend against the charge and not just deny that they have done
2 anything wrong.”” *Kearns*, 567 F.3d at 1124 (citing *Bly-Magee v. California*, 236 F.3d 1014,
3 1019 (9th Cir. 2001); *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993)) (internal
4 quotations omitted). Rule 9(b) does not require Plaintiffs to plead above and beyond providing
5 Apple with notice of the alleged conduct giving rise to their claims. *See Swartz*, 476 F.3d at 764.
6 The Ninth Circuit has explained that claims grounded in fraud must simply “be accompanied by
7 the who, what, when, where, and how of the misconduct charged.” *Vess*, 317 F.3d at 1106 (9th
8 Cir. 2003) (internal quotation marks and citation omitted).

9 The FAC provides Apple with notice of the particular conduct giving rise to Plaintiffs’
10 claims, *Swartz*, 476 F.3d at 764, and sets forth the time, place, and specific content of Apple’s
11 false representations. *Edwards*, 356 F.3d at 1066 (9th Cir. 2004). For Apple to argue that it is
12 ignorant of the misconduct alleged in Plaintiffs’ FAC is simply not credible, especially given
13 that it has apparently scoured the Internet to find comments supporting its thinly-disguised
14 summary judgment arguments.

15 The FAC alleges that Apple marketed and advertised the Devices with claims of 8 GB
16 and 16 GB storage capacity, but failed to disclose to Plaintiffs and consumers that there would
17 be shortfall of 18.1-23.1% between what was advertised and what consumers would actually
18 receive after iOS 8 was installed [the “who” and “what”]. *See, e.g.*, FAC ¶ 24. The FAC
19 discusses the timeframe for release of the Devices and iOS 8 [the “when”]. *See, e.g.*, FAC ¶¶ 14,
20 32-34. The FAC alleges that the contested allegations appeared on Apple’s website, in its
21 advertising, product packaging and other promotional materials [the “where”]. *See, e.g.*, FAC ¶¶
22 15, 18, 20, 23, 27, 45. The FAC explains the technology at issue and the manner in which Apple
23 misrepresented the information, gave consumers less than they bargained for and subsequently
24 schemed to sell consumers iCloud storage on the back end [“how”]. FAC ¶¶ 25-36. Each count
25 in the FAC incorporates by reference all preceding paragraphs therein. FAC ¶¶ 50, 59, and 71.
26 The FAC also contains allegations regarding Plaintiffs’ expectations, reliance on Apple’s
27 representations, and the resulting harm. *See, e.g.*, FAC ¶ 57. Apple’s suggestion that Plaintiffs
28 make no allegations regarding deceptive statements and that the FAC falls short of the Rule 9(b)

1 pleading requirements is simply not credible. The FAC contains ample allegations identifying
2 the “who, what, when, where, and how” of each claim. *Vess*, 317 F.3d at 1106.

3 **C. The Devices are “goods” for purposes of the CLRA.**

4 Apple’s arguments that the CLRA does not extend to the transactions at issue ignores the
5 clear allegations in the FAC. As alleged in the FAC, “Plaintiff Orshan purchased two iPhone 5s
6 represented by Apple to have 16 gigabytes (“16GB”) of purported storage capacity ...” and
7 Plaintiff Orshan also purchased two iPads represented by Apple to have 16 gigabytes (“16GB”)
8 of purported storage capacity ...” FAC ¶¶ 16-17. And “Plaintiff Endara purchased an iPhone 6
9 represented by Apple to have 16 gigabytes (“16GB”) of purported storage capacity ...” FAC
10 ¶19. “Plaintiff Henderson purchased an iPad2 represented by Apple to have 16 gigabytes
11 (“16GB”) of purported storage capacity ...” Plaintiffs each purchased one or more Devices,
12 which deceptively claimed to have more storage capacity than they did. And all of the Devices
13 at issue constitute “goods” under the CLRA. While iOS 8 plays a critical part in Apple’s alleged
14 fraud, no Plaintiff alleges that they purchased iOS 8 and were harmed thereby. Rather, they
15 purchased “goods” containing or requiring upgrades to iOS 8. Indeed, one cannot purchase iOS
16 8, because it is free.

17 As Defendant itself acknowledges, neither iOS nor the iPhone (or iPod or iPad) exist in a
18 vacuum. It is essentially impossible to purchase an iPhone without iOS (today’s version for sale
19 is iOS 8). All of the cases cited by Defendant in support of its CLRA argument involve software
20 alone, rather than software that comes free with a good. Accordingly, Apple’s citations are
21 inapposite. *Cf. Ladore v. Sony Computer Ent. Am., LLC*, No. C-14-3530 EMC, 2014 U.S. Dist.
22 LEXIS 173766, at *20 (N.D. Cal. Dec. 16, 2014) (rejecting argument that a video game was not
23 a “good” under the CLRA, as “received a tangible product—namely the Killzone game disc,
24 which came in a Killzone box and was accompanied by various tangible pieces of
25 documentation”).

26 **D. Plaintiffs have standing to sue over all iOS products that were
27 affected by iOS 8 in the same way.**

28 Plaintiffs are seeking to represent a class and a subclass, both of which are composed of

1 purchasers of Devices that originally, or upon upgrade, are running iOS 8. While the Devices
2 have some different functionalities, the way they were affected by iOS 8 remains the same: they
3 lost an unreasonable and improperly disclosed amount of storage capacity. Apple's argument
4 that the named Plaintiffs lack standing simply because they did not purchase each and every
5 iteration of the Devices misconstrues the applicable standard. For this reason, the cases cited by
6 Apple are inapposite.

7 In determining whether a plaintiff has standing to assert claims on behalf of users of
8 other products, the “critical inquiry” is “whether there is sufficient similarity between the
9 products purchased and not purchased.” *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No. C-11-
10 2910 EMC; No. C-11-3164, 2012 WL 2990766, at *11 (N.D. Cal. July 20, 2012). Importantly, a
11 plaintiff who brings a claim on behalf of persons who bought substantially similar products “is
12 not asserting standing to sue over injuries he did not suffer. Rather, [he] asserts that he suffered
13 the same injuries as a result of buying the Purchased Product that the unnamed class members
14 suffered as a result of buying the Substantially Similar Products.” *Werdebaugh v. Blue Diamond*
15 *Growers*, Case No. 12-CV-02724-LHK, 2013 WL 5487236, at *13-14 (N.D. Cal Oct. 2, 2013).
16 Thus, Plaintiffs are suitable representatives for the class even when they “did not purchase every
17 accused product,” so long as the offending representations made were the same for all the
18 products in the class definition. *Lanovaz v. Twinings N. Am.*, Case No. C-12-02646-RMW, 2014
19 WL 1652338, at *4 (N.D. Cal. April 24, 2014); *see also Astiana v. Kashi Co.*, 291 F.R.D. 493,
20 502 (S.D. Cal. 2013); *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 539 (N.D. Cal. 2012);
21 *Chavez v. Blue Sky Natural Bev. Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010).

22 Here, the Devices are issue are all made by Apple, all claim to have 8 GB or 16 GB of
23 storage capacity, and all have substantially less storage capacity as advertised. Thus, Plaintiffs
24 have standing to sue on behalf of consumers of all Devices. The remaining cases cited by Apple
25 are easily distinguishable. For example, in *Larsen v. Trader Joe’s Co.*, No. C-11-05188 SI, 2012
26 WL 5458396 (N.D. Cal. June 14, 2012), the plaintiffs included wildly different products in their
27 complaint regarding the defendant’s alleged mislabeling of foods as “all natural,” ranging from
28 cookies to apple juice to ricotta cheese. *Id.* at *2-3. The court in *Larsen* dismissed the complaint

1 as to one product only – crescent rolls – because none of the plaintiffs had purchased them. *Id.*
2 at *14.⁸

3 **V. CONCLUSION**

4 For the reasons set forth above, Plaintiffs respectfully request that Defendant's motion to
5 dismiss be denied in its entirety.⁹

6 Dated: June 5, 2015

Respectfully submitted,

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22
23 ⁸ Moreover, to the extent *Larson* suggests a more narrow view of standing, it has been
24 rejected by the majority of courts in this Circuit. See, e.g., *Madenlian v. Flax USA Inc.*, SACV-
13-01748 JVS (JPRx), 2014 U.S. Dist. LEXIS 181473 (C.D. Cal. Mar. 31, 2014) (explicitly
rejecting *Larson*'s narrow view of the standing requirement).

25
26 ⁹ Alternatively, should the Court find persuasive any of Defendant's arguments, Plaintiffs
request leave to amend the FAC to cure any deficiencies. Leave to amend should be "freely
given" when the plaintiff could cure the pleading defects and present viable claims. Fed. R. Civ.
P. 15 (a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, to the extent the Court deems any of
the pleadings subject to dismissal, Plaintiffs have not unduly delayed any matter concerning this
cause of action, and can present viable claims on all causes of action included in the FAC.

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